

From Response to Comments Document (pertaining to general comments), the following two areas were raised to discuss as a group:

Clarification: We reviewed all comments and this document is intended to address all comments. Because of the number and variety, we summarized comments and combined comments on similar topics and issues.

1. Enforcement

Comment: One commenter noted that Oregon fails to systematically address water quality standard violations caused by excess sedimentation.

Source: 57-UU

Response: CZARA requires state coastal nonpoint programs to “provide for the implementation” of the 6217(g) management measures (Section 6217(b)). NOAA and EPA have identified sediment impacts from forestry activities that have not been addressed through the standard suite of management measures and have required Oregon to address sediment impacts through additional management measures for forestry.

Beyond requiring additional management measures for forestry that are designed to address excess sedimentation from timber activities, implementation of Oregon’s coastal nonpoint program and evaluation of the effectiveness of that program occur after federal program approval. Section 6217(c)(2) of CZARA calls on states to implement their approved programs through changes to their nonpoint source management plan, approved under Section 319 of the Clean Water Act, and through changes to its coastal zone management program, developed under Section 306 of the Coastal Zone Management Act. Therefore, NOAA and EPA evaluate how well a state is implementing its coastal nonpoint program through routine assessment mechanisms for the state's Nonpoint Source Management Program and Coastal Management Program.

Finally, as stated in the introductory chapter of the 6217(g) guidance, *Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters*, the legislative history (floor statement of Rep. Gerry Studds, House sponsor of section 6217) acknowledges that the management measures are based on technical and economic achievability rather than achieving particular water quality standards.¹ The legislative history indicates that implementation of management measures was “intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause and effect linkages between particular land use activities and specific water quality problems.” Therefore, as noted above, under the Coastal Nonpoint Program, NOAA and EPA assess whether or not a state has appropriate technology-based management measures in place, not whether the approaches effectively achieve water quality standards.

If, after implementing the technology-based 6217(g) management measures, water quality impairments are still occurring, CZARA employs an adaptive management approach. The Act requires states to provide for the implementation of additional management measures within identified areas to address land uses that are either currently causing water quality impairments or where reasonably foreseeable new or expanding land uses could threaten coastal water quality (Section 6217 (b)(3)).

¹ Cong. Rec. E3589-E3590, Oct. 27, 1990

2. Process for Identifying Critical Coastal Areas and Additional Management Measures is Not Effective

Comment: One commenter states that Oregon's process for identifying critical coastal areas and the need for additional management measures, which relies largely on the state's Clean Water Act 303d listing process for impaired waters and TMDL program, is flawed in several ways. Specifically, the commenter believes Oregon's Clean Water Act 303d listing process is not effective. The state fails to meet the 303d list regulatory requirements to "assemble and evaluate all existing and readily available water quality related data and information to develop the list" and the state does not use nonpoint source assessments to develop its 303d lists. The commenter also states that Oregon ignores a variety of technical information available to help identify land uses that consistently cause or contribute to water quality standard violations. In addition, the commenter noted that Oregon does not use TMDLs to identify critical coastal areas and assess where existing CZARA management measures are not adequate for meeting water quality standards, as required for CZARA approval. The commenter also notes that the associated TMDL water quality management plans do not support an effective coastal nonpoint program. For example, despite the numerous temperature TMDLs that have been developed in Oregon's coastal watershed, they assert that load allocations have not been used to determine minimum riparian buffer width, height, or density to achieve the load allocation.

Response: NOAA and EPA did not propose a finding on the approvability of Oregon's process for identifying critical coastal areas and additional management measures and did not solicit comment on this issue at this time. The public will have an opportunity to comment on this aspect of Oregon's program at some point in the future before the agencies fully approve Oregon's coastal nonpoint program.

3. Suitability of Voluntary Approaches Backed By Enforceable Authorities

Comment: Several commenters noted that CZARA requires coastal states to have enforceable mechanisms for each management measure. They were not satisfied with the voluntary approaches Oregon was using to address many CZARA management measure requirements. They noted that the voluntary approaches were not being adhered to and that Oregon was not using its back-up authority to enforce and ensure implementation of the CZARA management measures, when needed. A few commenters also noted that Oregon had not described the link between the enforcement agency and implementing agency and the process the agencies will use to take enforcement action when voluntary approaches are not adequate to protect water quality. Another commenter noted that voluntary approaches will not work and that the state needed to adopt approaches that could be enforced directly.

Source: 15-C, 15-D, 16-A, 28-E, 30-O, 46-H, 49-J

Response: States must have enforceable policies and mechanisms to implement the CZARA management measures (see Section 306(d)(16) of the Coastal Zone Management Act). As the NOAA and EPA January 1993 *Coastal Nonpoint Pollution Control Program Development and Approval Guidance* states, "these enforceable policies and mechanisms may be state or local regulatory controls, and/or non-regulatory incentive programs combined with state enforcement authority." Therefore, voluntary, incentive-based programs are acceptable approaches for meeting the CZARA management measure requirements as long as the state has demonstrated it has adequate back-up authority to ensure implementation of the CZARA management measures, when necessary.

For coastal nonpoint program approval, CZARA requires NOAA and EPA to assess whether or not the state “provides for the implementation” of 6217(g) management measures (Section 6217(b)). To do this, NOAA and EPA examine whether the state has processes in place that are backed by enforceable policies and mechanisms to implement the 6217(g) management measures. In approving a state’s coastal nonpoint program, NOAA and EPA cannot consider how well those processes, including voluntary ones, are working or being enforced; rather, we require the state to provide the following:

1. a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
2. a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and
3. a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

(See Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 and Enforceable Policies and Mechanisms for State Coastal Nonpoint Programs.)²

Program implementation, and evaluation of the effectiveness of that implementation, occurs after coastal nonpoint program approval. Section 6217(c)(2) of CZARA calls on states to implement their approved programs through changes to their nonpoint source management plan, approved under Section 319 of the Clean Water Act, and through changes to its coastal zone management program, developed under Section 306 of the Coastal Zone Management Act. Therefore, NOAA and EPA evaluate how well a state is implementing its coastal nonpoint program through routine assessment mechanisms for the state’s Nonpoint Source Management Program and Coastal Management Program.

Contrary to a few commenters, the federal agencies believe the state has sufficiently demonstrated the link between implementing and enforcing agencies as well as a commitment to use that authority for the new development and onsite sewage disposal system management measures. However, NOAA and EPA agree with the commenter that the state has not met all the requirements for relying on voluntary programs, backed by enforceable authorities, to address its conditions related to additional management measures for forestry. The rationales for those conditions in the final findings document on Oregon’s Coastal Nonpoint Program explain why NOAA and EPA have made those findings.

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If, after implementing the technology-based 6217(g) management measures, water quality impairments are still occurring, CZARA employs an adaptive management approach. The Act requires states to provide for the implementation of additional management measures within identified areas to address land uses that are either currently causing water quality impairments or where reasonably foreseeable new or expanding land uses could threaten coastal water quality (Section 6217 (b)(3)).

Comment [CJ1]: From Christine: Doesn't this undermine the approach we used for forestry? It seems to me that we did rely on evidence of failure to achieve WQS to require additional management measures. It seems to me that our rationale was that the basic forestry g measures weren't enough. Hence, the need for additional. I stand to be corrected if I've got this wrong.

Comment [CJ2]: From Lynda: It seems to me the answer could stop after the first brief paragraph and that the rest of this is not really germane. The commenter isn't asking how CZARA works or might address the 'systematic' failure to address sediment. Also as I noted earlier, we should exercise caution in referring to 319 and 306 as the ongoing mechanisms for seeing that MMs are implemented and evaluating performance of the CNP. I don't think either program has the resources or intention to do this comprehensively, so we should not raise expectations in this regard. I suggest NOAA and EPA HQ folks discuss this further.

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Response: NOAA and EPA did not propose a finding on the approvability of Oregon's process for identifying critical coastal areas and additional management measures and did not solicit comment on this issue at this time. The public will have an opportunity to comment on this aspect of Oregon's program at some point in the future before the agencies fully approve Oregon's coastal nonpoint program.

Comment [AC3]: This would also be fairly easy to respond to based on what CZARA requires: processes for IDing land uses, CCAs, and add MMs within those CCAs to address problem land uses which the state has. For approval purposes, we do not evaluate how well these processes are being implemented (see response to "Enforcement" comment above). However, while it could be helpful to get that out now, it goes against our decision not to provide substantive responses to aspects of Oregon's program we did not solicit comment for.

LH – I agree with way it is handled here.

3. Suitability of Voluntary Approaches Backed By Enforceable Authorities

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For coastal nonpoint program approval, CZARA requires NOAA and EPA to assess whether or not the state “provides for the implementation” of 6217(g) management measures (Section 6217(b)). To do this, NOAA and EPA examine whether the state has processes in place that are backed by enforceable policies and mechanisms to implement the 6217(g) management measures. In approving a state’s coastal nonpoint program, NOAA and EPA cannot consider how well those processes, including voluntary ones, are working or being enforced; rather, we require the state to provide the following:

Comment [PC4]: Is this really true? Where does this come from?

1. a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
2. a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures; and
3. a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.

(See *Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 and Enforceable Policies and Mechanisms for State Coastal Nonpoint Programs*.)²

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Comment [PC5]: Ideally, perhaps, but in reality there’s usually a record of implementation that we did not ignore with respect to forestry.

Contrary to a few commenters, the federal agencies believe the state has sufficiently demonstrated the link between implementing and enforcing agencies as well as a commitment to use that authority for the new development and onsite sewage disposal system management measures. However, NOAA and EPA agree with the commenter that the state has not met all the requirements for relying on voluntary programs, backed by enforceable authorities, to address its conditions related to additional management measures for forestry. The rationales for those conditions in the final findings document on Oregon’s Coastal Nonpoint Program explain why NOAA and EPA have made those findings.

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